IN THE
MISSOURI SUPREME COURT

JOHN E. WINFIELD,	)	
	)	
Appellant,	)	
	)	
	)	
vs.	)	**No. SC84244**
	)	
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal to the MISSOURI SUPREME COURT
From the Circuit Court of ST. LOUIS COUNTY
Twenty-First Judicial Circuit, The Honorable Maura B. McShane, JUDGE

APPELLANT'S REPLY BRIEF

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AUTHORITIES

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

RULES:

MAI's:

Jurisdiction

Appellant, John E. Winfield, incorporates the Jurisdictional Statement contained in his Opening Brief (App.Br.8).

Facts

John incorporates the Facts contained in his Opening Brief (App.Br.9-22).

Points

I.

The motion court clearly erred in overruling John's 29.15 claim that trial counsel did not let him testify during penalty phase because that ruling violated John's rights to effective assistance of counsel, testify in his defense, due process, his privilege against compelled self-incrimination, and subjected him to cruel/unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21. John had a fundamental right to testify in the penalty phase of his trial, and that right could only be denied upon proof that *John* knowingly, intelligently and voluntarily waived it. No such proof exists. Indeed, Counsel Kessler knew that John wanted to testify, but, because of "petty differences" with Counsel Rosenblum, Kessler didn't make John's desire known to the trial court. John didn't know that whether he would testify was *his* decision, so, after Rosenblum called the last defense witness, John asked "Could I testify?" or "Am I going to testify?" Rosenblum replied, "I'm going to rest," and he did – without letting John testify. There is a reasonable probability that the result would have been different had John been able to tell the jury about his background, his deep love for his children and his desire to remain a "big part" of their lives.

State v. White, 798 S.W.2d 694 (Mo.banc 1990)

U.S.Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art.I, §§10,18(a),21.

II.

The motion court plainly erred in failing to vacate John's death sentences because such ruling violated John's rights to due process, a fair trial, effective counsel, freedom from cruel/unusual punishment and his privilege against self-incrimination. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§ 10,18(a), 19,21. John testified in guilt phase but not in penalty phase; this fact was "inescapably impressed on the jury's consciousness." Although John had a fundamental right not to have the jury transform his silence into an aggravating circumstance, the jury did not know that because (a) the trial court ignored its "serious and weighty" responsibility to insure that *John* had knowingly, intelligently and voluntarily waived his fundamental right; and (b) trial counsel did not request the "no-adverse-inference" instruction. Had trial counsel offered that instruction, the trial court would have been obliged to give it. But for trial counsel's error left John's failure to testify would not have been "inescapably impressed upon the jury's consciousness," and there is a reasonable probability that the jury would have spared his life. This error was blatantly obvious from the record and caselaw, but post-conviction counsel failed to raise it in the amended motion. Because post-conviction counsel abandoned John in his first appeal of right as to his right to effective counsel, this Court should excuse the default.

Lakeside v. Oregon, 435 U.S. 333 (1978);

State v. Mayes, 63 S.W.3d 615 (Mo.banc 2001);

U.S. Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art.I, §§10,18(a),21;

MAI CR3d 313.30A.

IV.

The motion court clearly erred in failing to reappoint counsel before reaching the merits of John's 29.15 motion because such failure violated John's rights to due process, effective counsel, a full and fair hearing, and freedom from cruel/unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21; Rules 29.15(e), 29.16. Missouri courts refuse to review claims of ineffective counsel on direct appeal; rather, those claims must wait for post-conviction review, during which movants have the right to counsel. Indeed, since Rule 29.15 provides Missouri defendants with their first appeal of right as to their constitutional right to counsel, 29.15 counsel must provide effective assistance to insure that the amended motion includes (A) all claims known and (B) sufficient facts. Here, 29.15 counsel did neither: (A) they omitted any claim regarding John's right to have the "no-adverse-inference" instruction submitted during penalty phase – an error for which this Court had reversed *State v. Storey* for a new penalty phase just 15 months earlier; they omitted any claim regarding the total breakdown in communication between Kessler, Rosenblum and John; and (B) they alleged several questions that trial counsel should have asked regarding unadjudicated assaults against Carmel, but they omitted any hint of what answers trial counsel might have gotten.

Coleman v. Thompson, 501 U.S. 722 (1991);

In the Matter of Carmody, 653 N.E.2d 977 (Ill.App. 4thDist. 1995);

Jackson v. Weber, 637 N.W.2d 19 (S.D. 2002);

Pennsylvania v. Finley, 481 U.S. 551 (1987);

U.S. Const., Amends. V,VI,VIII,XIV;

Mo.Const., Art.I, §§10,18(a),21;

Rules 29.15, 29.16;

MAI CR3d 313.30A.

Argument

I.

The motion court clearly erred in overruling John's 29.15 claim that trial counsel did not let him testify during penalty phase because that ruling violated John's rights to effective assistance of counsel, testify in his defense, due process, his privilege against compelled self-incrimination, and subjected him to cruel/unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21. John had a fundamental right to testify in the penalty phase of his trial, and that right could only be denied upon proof that *John* knowingly, intelligently and voluntarily waived it. No such proof exists. Indeed, Counsel Kessler knew that John wanted to testify, but, because of "petty differences" with Counsel Rosenblum, Kessler didn't make John's desire known to the trial court. John didn't know that whether he would testify was *his* decision, so, after Rosenblum called the last defense witness, John asked "Could I testify?" or "Am I going to testify?" Rosenblum replied, "I'm going to rest," and he did – without letting John testify. There is a reasonable probability that the result would have been different had John been able to tell the jury about his background, his deep love for his children and his desire to remain a "big part" of their lives.

This Court does not conduct *de novo* review, but neither does it limit its review to the four corners of the motion court's findings. The State analyzes John's claim by referring only to the motion court's findings and the evidence referenced therein (RespBr.

20-31). That analysis disregards that this Court must consider *the entire record* to determine whether the motion court clearly erred. *State v. White*, 798 S.W.2d 694, 697 (Mo.banc 1990). In his opening brief, John pointed to two critical portions of the record ignored by the motion court: (1) that both Kessler and Rosenblum represented John during the penalty phase of trial (AppBr. 42-44) and (2) that, before Rosenblum rested, John asked whether he was going to testify (AppBr. 46). Like the motion court, the State did not address these matters. Contrary to the State's assertions, John does not seek *de novo* review by this Court (RespBr. 20,28). He simply seeks a review of the *entire record* rather than a review of only those matters contained in the motion court's findings. For all the reasons discussed in John's opening brief, this Court should reverse the motion court's order, vacate John's death sentence and remand for a new penalty phase trial.

II.

The motion court plainly erred in failing to vacate John's death sentences because such ruling violated John's rights to due process, a fair trial, effective counsel, freedom from cruel/unusual punishment and his privilege against self-incrimination. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I,§§ 10,18(a), 19,21. John testified in guilt phase but not in penalty phase; this fact was "inescapably impressed on the jury's consciousness." Although John had a fundamental right not to have the jury transform his silence into an aggravating circumstance, the jury did not know that because (a) the trial court ignored its "serious and weighty" responsibility to insure that *John* had knowingly, intelligently and voluntarily waived his fundamental right; and (b) trial counsel did not request the "no-adverse-inference" instruction. Had trial counsel offered that instruction, the trial court would have been obliged to give it. But for trial counsel's error left John's failure to testify would not have been "inescapably impressed upon the jury's consciousness," and there is a reasonable probability that the jury would have spared his life. This error was blatantly obvious from the record and caselaw, but post-conviction counsel failed to raise it in the amended motion. Because post-conviction counsel abandoned John in his first appeal of right as to his right to effective counsel, this Court should excuse the default.

The State claims that counsels' failure to offer the "no-adverse-inference" instruction "was reasonable trial strategy" because giving the instruction "would only serve[] to highlight appellant's decision to not testify [sic]." (RespBr. 33, n.3). The State

cites *Ellis v. State*,773 S.W.2d 194, 199 (Mo.App.,S.D. 1989), and ignores the United States Supreme Court cases cited by John in his opening brief (*See* AppBr. 53-54). The United States Supreme Court first rejected the State's assertion in *Lakeside v. Oregon*, 435 U.S. 333, 339 (1978). Three years later, in *Carter v. Kentucky*, 450 U.S. 288, 301 (1981), the Court specifically reiterated that "[i]t would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect." Stranger, still, is the State's refusal to respond to this reality.

The State makes but one other response to the merits of this issue. It insists that the "no-adverse-inference" instruction, MAI CR3d 313.30A, is an optional instruction (RespBr. 33, n.3). Incredibly, the State claims that this Court made this instruction optional. *Id., citing State v. Storey*, 986 S.W.2d 462, 463-464 (Mo.banc 1999). It made this same argument in *State v. Mayes*, 63 S.W.3d 615, 636 (Mo.banc 2001), where this Court held, "The State's argument proves too much." It still does, and, for all the reasons discussed in John's opening brief, this Court should vacate John's death sentences and remand for a new penalty phase trial.

IV.

The motion court clearly erred in failing to reappoint counsel before reaching the merits of John's 29.15 motion because such failure violated John's rights to due process, effective counsel, a full and fair hearing, and freedom from cruel/unusual punishment. U.S.Const., Amends. V,VI,VIII,XIV; Mo.Const., Art.I, §§10,18(a),21; Rules 29.15(e), 29.16. Missouri courts refuse to review claims of ineffective counsel on direct appeal; rather, those claims must wait for post-conviction review, during which movants have the right to counsel. Indeed, since Rule 29.15 provides Missouri defendants with their first appeal of right as to their constitutional right to counsel, 29.15 counsel must provide effective assistance to insure that the amended motion includes (A) all claims known and (B) sufficient facts. Here, 29.15 counsel did neither: (A) they omitted any claim regarding John's right to have the "no-adverse-inference" instruction submitted during penalty phase – an error for which this Court had reversed *State v. Storey* for a new penalty phase just 15 months earlier; they omitted any claim regarding the total breakdown in communication between Kessler, Rosenblum and John; and (B) they alleged several questions that trial counsel should have asked regarding unadjudicated assaults against Carmel, but they omitted any hint of what answers trial counsel might have gotten.

The State does not respond to John's analysis of why this Court must recognize that its post-conviction rule creates a bifurcated appeal process in which the 29.15 action becomes the first appeal of right as to the constitutional effectiveness of trial counsel. Instead, the State reframes the question as though John had "urge[d] this Court to adopt

the proposition that *an appeal* arising from a post-conviction relief motion is a 'first appeal of right…." (RespBr. 48) (emphasis added). This seeks to mislead this Court because that is not the question John has posed. After all, *Coleman v. Thompson*, 501 U.S. 722, 755 (1991) made clear that "an appeal arising from a post-conviction relief motion" is not a first appeal of right. In other words, this appeal is not a first appeal of right. *Coleman*, however, did not consider whether the post-conviction trial constitutes the first appeal of right such that post-conviction movants are entitled to effective assistance from post-conviction counsel.

The State claims that *Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999), *Nolan v. Armontrout*, 973 F.2d 615, 617 (8th Cir. 1992) and *Roberts v. Bowersox*, 61 F.Supp2d 896, 916 (E.D.Mo. 1999) have "soundly rejected" this claim (RespBr. 48). The State's headnote citations to *Burns*, *Nolan*, and *Roberts* provide no assistance to this Court. These three cases rely on the faulty premise that post-conviction actions can never serve as a first appeal of right. These cases are no more persuasive than the three Missouri Court of Appeals decisions analyzed in John's opening brief (*See* AppBr. 73-74). "[I]t is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question." *Pennsylvania v. Finley*, 481 U.S. 551, 556 (1987).

As fully discussed in John's opening brief, Missouri has created a bifurcated appeal process in which the Rule 29.15 action serves as the first appeal of right as to the constitutional right to effective counsel (AppBr. 72). Of necessity, the State ignores this part of the analysis and jumps right to its conclusion. The right to appeal exists at the

state's discretion. *McKane v. Durston*, 153 U.S. 684, 687 (1894). Once a state creates the right to appeal, however, it must adopt procedures for the appeal that comport with Due Process. *Evitts v. Lucey*, 469 U.S. 387, 393-394 (1985). The State does not even try to explain how Missouri can, consistent with Due Process, dissect the right to effective counsel and render it the one and only constitutional right to which there is no appeal of right.

This Court vested John with the right to counsel in his 29.15 action. Rule 29.15(e). Then it removed the requirement that the amended motion be verified, stripping movants like John of any power to control the content of the amended motion filed by counsel. Rule 29.15(g). This Court has also promised such movants that 29.15 counsel will meet very specific qualifications. Rule 29.16(b). It should now recognize that these steps would simply serve superficially to satisfy due process if counsel were not required to be effective as to those claims John could not previously appeal, i.e., claims regarding effective counsel. *In the Matter of Carmody*, 653 N.E.2d 977, 983 (Ill.App. 4thDist. 1995); *Jackson v. Weber*, 637 N.W.2d 19, 22-23 (S.D. 2002). Therefore, this Court should reverse the motion court's order and remand for further proceedings so that John may prove that post-conviction counsel rendered ineffective assistance to John's substantial prejudice.

Conclusion

This trial did not produce a fair ascertainment of the truth, thus John E. Winfield respectfully requests the following relief:

New Trial:	Point III
New Penalty-Phase:	Points I,II,V,VI,VII
New PCR:	Point IV
Evidentiary Hearing:	Point VIII

Respectfully Submitted,

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this brief contains **2,660** words, which does not exceed the 7,750 words allowed for appellant's reply brief.
- ✓ The floppy disc filed with this brief contains a copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which is updated every Sunday (i.e., last updated on August 18, 2002). According to that program, the disc is virus-free.
- ✓ True and correct copies of the attached brief and floppy disc were mailed, this 21st day of August 2002, to Audara Charlton, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Gary E. Brotherton